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SUPREME COURT OF THE UNITED STATES

October Term 1961

No. 273

LEE HENSLEE, SUPERINTENDENT OF THE ARKANSAS STATE PENITENTIARY ..... *Petitioner*

v.

LUTHER BAILEY ..... *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

FRANK HOLT

Attorney General
State of Arkansas

THORP THOMAS

Assistant Attorney General
State of Arkansas

Counsel for Petitioner

PARAGON PRINTING CO., LITTLE ROCK

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Attorney General of the State of Arkansas, on behalf of Lee Henslee, Superintendent of the Arkansas State Penitentiary prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, reversing the conviction of respondent for rape.

OPINION BELOW

The opinion of the District Court is reported in 184 F. Supp. 298. The opinion of the Court of Appeals (Appendices, *infra*, pp. 1-20) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered March 17, 1961 (Appendices, *infra*, p. 21). A petition

for rehearing was filed April 25, 1961, and was denied by the Court of Appeals on May 4, 1961 (Appendices, *infra*, p. 22). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTION PRESENTED

Whether there was discrimination in the selection of the jury panel which tried and convicted respondent.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States.

STATEMENT

In September of 1956, respondent was tried and convicted in the First Division of the Pulaski County Circuit Court [1] on a one count information charging rape. Since his conviction the case has been in the appellate courts several times. For a history of the appeals see footnote 3 of the opinion of the Court of Appeals (Appendices, *infra*, p. 2).

Pursuant to a suggestion by this Court in denying a petition for writ of certiorari in *Bailey* v. *Henslee*, 361 U.S. 945, the respondent petitioned the United States District Court for the Eastern District of Arkansas for a writ of habeas corpus. He based his petition on the question whether members of the Negro race were deliberately and intentionally limited and excluded in the selection of petit jury panels.

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[1] The Circuit Court of Pulaski County is divided into three divisions. The First Division, in which respondent was tried, tries only criminal cases. The Second and Third Divisions handle the civil docket exclusively.

On April 1, and April 12, 1960, testimony was taken in the District Court on an order to show cause why a writ of habeas corpus should not be issued. After hearing the evidence the District Court found that there was no discrimination in the selection of the panel of the 1956 March term which tried respondent, and that a *prima facie* case of discrimination was not made by a comparison of jury panels through a number of prior years. On appeal, the judgment was reversed.

THE EVIDENCE

At the hearing in the District Court it was stipulated by respective counsel that no negro had served on a petit jury panel in the Second and Third Divisions of the Pulaski County Circuit Court since 1939.

The District Court also considered the evidence adduced at respondent's trial which reflected the record of poll tax receipts issued in Pulaski County for the years 1954 and 1955. These records showed that the total number of colored poll tax holders (1954) 10,180 14.8% (1955) 8,557 13.3%. Total number of white (1954) 58,484 85.2% (1955) 55,980 86.7% (R.24). The testimony and the records reflect that the jury panels were constituted as follows:

TERM OF COURT	TOTAL NO. JURORS			TOTAL NO. NEGROES		
	REG.	ALT.	SPECIAL	REG.	ALT.	SPECIAL
March 1952	24	12	Not Shown	2	0	Not Shown
Sept. 1952	24	12	Not Shown	1	0	Not Shown
March 1953	24	12	Not Shown	2	0	Not Shown
Sept. 1953	24	12	50	2	0	3
March 1954	24	12	24	2	0	Not Shown
Sept. 1954	24	12	100	2	1	Not Shown
March 1955	24	12	100	3	0	4
Sept. 1955	24	12	100	3	0	Not Shown
March 1956	24	12	450	3	0	Not Shown [2]

[2] A total of five special panels, with approximately 450 names, were selected. It is uncertain how many were actually called. Race could not be determined.

The above information has to be qualified to the extent that there was no way of knowing whether the special panels contained any negroes for the reason that the testimony revealed that race could not be determined until the particular juror reported for duty.[3]

The jury commissioners for the March, 1956, term, in the First Division of the Pulaski County Circuit Court testified that they selected jurors for the regular and alternate panel whom they thought to be qualified, without consideration of race. They further testified that they had a wide acquaintance with both white and colored citizens of Pulaski County but did not select negroes with the intention of having any particular number and did select three negroes for the regular panel.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In reversing the judgment of the District Court.

2. In holding that the facts, taken in the aggregate, lead to a conclusion of a *prima facie* case of limitation of members of the negro race in the selection of the respondent's petit jury panel was established.

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[3] At. R. 110 Mr. Louis Rosteck, former deputy circuit clerk, testified as follows:

"Q. . . . Mr. Rosteck, is there any way that you can tell, from examining the list of the special panel of petit jurors in this March, 1956 term, whether they are white or colored?"

"A. No, sir, that is impossible to do unless I would be personally acquainted with some of them. The special panel No. 1 lists the name, address, and I believe, telephone numbers of some of them. The special panel No. 2 lists part of the names, address and telephone number, but on the remainder, all that is listed is the name and the telephone number and I have no way of determining whether these jurors are white or whether they are colored."

REASONS FOR GRANTING THE WRIT

I

The only apparent reason indicated by the reversal of the District Court by the Court of Appeals is the language contained by this Court in its denial of certiorari in *Bailey* v. *Henslee, supra,* where it was said:

> ". . . without prejudice to a further application for writ of habeas corpus in the appropriate United States District Court, on the question whether members of the petitioner's race were deliberately and intentionally limited and excluded in the selection of petit jury panels, in violation of the Federal Constitution."

The decision of the court below is directly in conflict with the decisions of this Court. Whether there has been systematic racial discrimination by administrative officials in the selection of jurors is a question to be determined from the facts in each particular case. *Patton* v. *Mississippi*, 332 U. S. 463. No case ever decided by this Court has reached the extreme decision of the Court of Appeals in the case at bar. The case of *Smith* v. *Texas*, 311 U. S. 128, is the closest in point. There the evidence showed that the service of negroes by years had been: 1931, 1; 1932, 2; 1933, 1; 1934, 1; 1935, none; 1936, 1; 1937, none; 1938, none. The testimony of the jury commissioners "admitted that they did not select any negroes, although the subject was discussed, but they denied that they intentionally, arbitrarily or systematically discriminated against negro jurors as such. One said that their failure to select negroes was because they did not know the names of any who were qualified, and the other said that he was not personally acquainted with any member of the negro race." However, this Court made clear the basis of its decision in the following language:

> Where jury commissioners limit those from whom grand juries are selected to their own personal acquaintance, discrimination can arise from commissioners who know no negroes as well as from commissioners who know but eliminate them. If there has been discrimination, whether accomplished ingeniously or ingenuously, the conviction cannot stand.

The basis of the above decision is far removed from the decision of the court below. This Court has never reversed a conviction on the sole basis of systematic limitation and never has reversed a case where negroes have been on every jury panel in varying numbers such as in the case at hand.

As this Court said in *Brown* v. *Allen*, 344 U. S. 443, 471:

> While discriminations worked by consistent exclusion have been rigorously dealt with, *Neal* v. *Delaware*, 103 U. S. 370; *Carter* v. *Texas*, 177 U. S. 442; *Norris* v. *Alabama*, 294 U. S. 587; *Pierre* v. *Louisiana*, 306 U. S. 354; *Hill* v. *Texas*, 316 U. S. 400; *Patton* v. *Mississippi*, 332 U. S. 463; variations in proportions of Negroes and whites on jury lists from racial proportions in the population have not been considered violative of the Constitution where they are explained and not long continued. *Akins* v. *Texas*, 325 U. S. 398, 403. Of course, token summoning of Negroes for jury service does not comply with equal protection, *Smith* v. *Texas*, 311 U. S. 128. Nor can a race be proscribed as incompetent for service, *Hill* v. *Texas*, 316 U. S. 400.
>
> Responsible as this Court is under the Constitution to redress the jury packing which Bentham properly characterized as a sinister species of art, Bentham, Elements of the Art of Packing as Applied to Special Juries, p. 6, it should not condemn good faith efforts to secure competent juries merely because of varying racial proportions.

Here, there has been no token summoning of negroes for jury service. As the evidence clearly shows there have been negroes on every jury panel in the First Division of the Pulaski Circuit Court, the criminal division, in varying numbers of one to seven. And, the District Court noted in *Bailey* v. *Henslee*, *supra*, at p. 302:

> In 1955, the poll tax year from which petitioner's jury was selected, Negroes constituted 13.3% of the poll tax holders in Pulaski County. Negroes constituted 8.33% of the regular and alternate jury panels initially selected, and 8.1% of the panel from which petitioner's jury was chosen. We do not believe that such evidence is sufficient to support a *prima facie* case of discrimination.

Nor can it be said that the jury commissioners acted in bad faith. In fact the evidence shows nothing but good faith efforts by the jury commissioners. Furthermore, the fact that the jury commissioners selected negroes for the panel satisfies the burden placed on the State under the holding in *Patton* v. *Mississippi*, *supra*, and the burden then devolved on respondent to show that the jury commissioners practiced "evasion". There is no such showing. The language of this Court in *Akins* v. *Texas*, 325 U. S. 398, squarely conflicts with the decision of the Court of Appeals. There it was said:

> Petitioner's sole objection to the grand jury is that the "commissioners deliberately, intentionally and purposely limited the number of the Negro race that should be selected on said grand jury panel to one member." Fairness in selection has never been held to require proportional representation of races upon a jury. *Virginia* v. *Rives*, 100 U. S. 313, 322-23; *Thomas* v. *Texas*, 212 U. S. 278, 282. Purposeful discrimination is not sustained by a showing that on a single grand jury the number of members of one race is less than that race's proportion of the eligible individuals. The

> number of our races and nationalities stands in the way of evolution of such a conception of due process or equal protection . . . Defendants under our criminal statutes are not entitled to demand representatives of their racial inheritance upon juries before whom they are tried. But such defendants are entitled to require that those who are trusted with jury selection shall not pursue a course of conduct which results in discrimination "in the selection of jurors on racial grounds." *Hill* v. *Texas*, *supra*, 404. Our directions that indictments be quashed when Negroes, although numerous in the community, were excluded from grand jury lists have been based on the theory that their continual exclusion indicated discrimination and not on the theory that racial groups must be recognized. *Norris* v. *Alabama*, *supra*; *Hill* v. *Texas*, *supra*; and *Smith* v. *Texas*, *supra*. The mere fact of inequality in the number selected does not in itself show discrimination.

As the above cases demonstrate, the decision of the Court of Appeals is directly in conflict with the decisions of this Court.

A further error was committed when this Court directed the District Court to hear evidence on the question whether members of respondent's race were deliberately and intentionally limited and excluded in the selection of petiti jury panels. It must be conceded that respondent could have very easily subpoenaed the jury commissioners for the March, 1956, term and placed their testimony in the original record. But this he did not do. He waited until the morning that the trial was to commence and then filed a motion to quash the jury panel. He did not subpoena the jury commissioners and did not have them available in order that they might testify. In fact he had made no effort to contact them and ascertain what their testimony might be. He then failed to make

an offer of proof as to what their testimony would have been had the trial court allowed him to subpoena them. *Bailey* v. *State*, 227 Ark. 889, 302 S.W. 2d 796. For this Court to later allow him to use evidence that he could have easily obtained at the original trial flies in the face of the previous decisions of this Court.

Evidence in state criminal proceedings to support objections on federal constitutional grounds, known to state defendants and their counsel, or easily ascertainable, cannot be withheld or neglected at the state trial and used later to support habeas corpus. State criminal proceedings would be unreasonably hampered, *Ex parte Spencer*, 228 U. S. 652, 660; *In re Wood*, 140 U. S. 278, 285; *Crowe* v. *United States*, 175 F. 2d 799; *Price* v. *Johnston*, 334 U. S. 266, 289, and the dissent.

Settlement of these questions by this Court is plainly in the interest of the administration of the criminal law since they are likely to be presented in almost every *habeas corpus* proceeding and in every case of conviction of a negro in a state court.

II

The decision below in holding that the facts, taken in the aggregate, lead to a conclusion of a *prima facie* case of limitation seems so contrary to principles enunciated by this Court that the petitioner also urges this aspect of the case as a basis for *certiorari*.

The opinion of the court below contained nine factual summations which it said lead them to the conclusion that a *prima facie* case of limitation of members of the negro race in the selection of the appellant's petit jury panel was established. These nine factual summations are discussed in order.

1. The court below said: "Since 1939 no Negro has ever served on any kind of panel, regular, alternate or special, in the Second or Third Divisions of the Pulaski County Circuit Court. A fact of this kind, as has been noted above, would support a conclusion that a *prima facie* case of discrimination in the selection of juries in these civil divisions has been established."

It is admitted that no negroes have served on the jury panels in the Second or Third Divisions of the Pulaski County Circuit Court since 1939. But these divisions are not involved in the case at bar. These divisions try only civil cases, they have their own jury commissioners and their own petit jury panels. This particular point has caused grave concern in the civil divisions and also in the criminal division of the Pulaski Court. It was not clear in the decision below what weight was attached to this particular fact. Consequently, these separate courts are presently at a loss as to what is expected of them in the formation of future petit jury panels. The First Division criminal court has no control over the naming of jury commissioners for the other divisions, and is thus placed in an impossible situation. The First Division could no more quash the jury panels in the Second and Third Divisions than it could a jury panel in Cook County, Illinois. These divisions of the Pulaski Circuit Court are just as distinct as though they were in separate counties. Certainly this Court has never gone so far as to say that the formation of the jury panels in "X" County would provide any "atmosphere" of exclusion in "Y" County. Yet, this is the practical effect of the language contained in the opinion of the court below. How does the fact that there are no negroes on the civil panels prejudice the rights of a negro on trial in the criminal division with its separate jury panel? The answer is

obvious—it cannot. Until the opinion of the court below is clarified the separate divisions cannot intelligently handle the business before them.

2. & 6. Here, the court below said: "The First Division's panels of alternates, from 1952 to 1960, with one possible exception, contained no Negro name. Here again it can be said that this fact creates an unrebutted *prima facie* case of discrimination in the selection of these alternates."

It will be noted by the above language the court below took into consideration the composition of eight subsequent jury panels. These were the panels from September, 1956, through March, 1960. They should not have considered any panel beyond the term at which the respondent was tried. For as this Court said in *Brown* v. *Allen*, *supra*: "Former errors cannot invalidate future trials." *A fortiori*, subsequent errors cannot invalidate former trials.

Again, under its factual summation 6, the court below said that "There is an unexplained and seemingly unusual amount of repetition of the names of negroes which do appear on the regular panels from 1953 to 1960 . . ." The petitioner insists that the court below erred in considering any evidence beyond the March, 1956, panel which actually tried the respondent. The reason for this insistence is that any negro presently in confinement could file a petition for a writ of habeas corpus and allege that since his conviction the formation of jury panels had been done in an unconstitutional manner and based on the opinion of the court below such petition would have to be considered as having merit. Obviously, if such a decision is allowed to stand, the several States will be subjected to the possibility of a large number of applications for writs of habeas corpus.

3. The court below noted "The 5 special panels assembled for the March, 1956, term in the First Division, which contained an aggregate of approximately 450 names, included, according to the stipulated Exhibit 1, the name of no Negro." This stipulation, however, was only to the extent that the present deputy circuit clerk would testify that to his knowledge the name of no negro was contained in the 5 special panels (R.5). The reason for the stipulation was that the clerk had no way of determining whether a negro had been selected or not. In fact since some of the 5 special panel lists were never opened how could anyone testify as to whether the lists contained the names of any negroes? They could not. However, since this point was definitely cleared up by the testimony of the former deputy circuit clerk, Louis W. Rosteck, the court below erred in considering the stipulation at all. Rosteck testified that the lists opened contained the names, addresses and telephone numbers of the persons selected. There was no indication of race and he could not determine whether these jurors were white or colored (R.110). Since some of the special panels were never opened and since the jury commissioners failed to designate color it thus became impossible to prove or disprove the presence of negroes on these special panels. Hence, the court below must have resorted to speculation and conjecture to say that no negroes were on the special panels.

4. The court below said here that "Fourteen of the persons on the defendant's own petit jury panel of 37 names came from those 2 special panels consisting exclusively of white persons. Then the court below quoted from *Maxwell* v. *State*, 217 Ark. 691, 232 S.W. 2d 982, 983, saying that in a not dissimilar situation the Supreme Court of Arkansas reversed because of a commingling of an original 13 jurors with a panel containing negroes.

The Maxwell case was reversed because there had been no negroes summoned for trial jury service for more than a quarter of a century. Instead of quashing the jury panel the trial court had a special panel summoned which contained eight negroes. The court then commingled this special panel with the remaining 13 members of the illegally constituted regular jury panel. But the facts in the case at bar are readily distinguishable from the facts contained in the Maxwell case. Here there was no illegally constituted jury panel in the first isntance, thus, the Maxwell case does not apply.

5. Although the court below said "We recognize, of course, that mere lack of identity in proportions is not in itself unconstitutional," it then took such a fact into consideration. This in itself ignores the decisions of this Court. *Virginia* v. *Rives*, 100 U. S. 313, 322-3; *Akins* v. *Texas*, *supra*. Nevertheless, even taking this factor into consideration, it fails to show any exclusion or limitation. The record reflects that in 1955 negroes constituted 13.3% of the poll tax holders in Pulaski County and 8.33% of the regular and alternate jury panels initially selected and 8.1% of the panel from which appellant's jury was chosen. These facts fall far short of showing discrimination or limitation in the selection of the jury panels.

7. The court below also said "The Pulaski County poll tax receipts were given racial marks. They contained a "C" when the holders were known to be colored and a "W" when they were known to be white. Where race was unknown, as was often the case when payment of the tax was made by mail, they were marked "W".

The fact that poll tax receipts are given racial marks is not deemed a factor in this case for how else can it be ascertained how many colored and how many white poll

tax holders are in a given county. It will have to be admitted that these marks would have been a factor had the evidence adduced reflected that a discriminatory resulted been reached as in *Avery* v. *Georgia*, 345 U. S. 559. But in the Avery case this Court made cleared the reason for its decision when it said:

> The stark resulting phenomenon here was that somehow or other, despite the fact than over 5% of the slips were yellow, no negro got onto the panel of 60 jurors from which Avery's jury was selected.

In the case at bar no such result was reached. The record here shows negroes have been selected on every jury panel since 1952. Hence, the court below erred in considering the racial marks.

8. & 9. Under these summations the court below said: "The jury commissioners, except, perhaps, for two terms, themselves identified names of Negroes on the lists by the designation "(C)" or "(Col)" or "(Colored)". Why this was done does not appear. There is testimony, as is usually the situation in these cases, that this was of no persuasion so far as the jury commissioners were concerned. The testimony of the jury commissioners as to their efforts to ascertain the names of qualified Negroes leaves much to be desired."

It is true that some of the jury commissioners identified names of negroes on the jury lists. It is also true that for two terms of court this was not done. On other lists some negroes were designated and some were not (R.114). Since the testimony shows that the markings were done in such a haphazard manner their evidentiary value becomes valueless and should not have been considered.

By saying that the testimony of the jury commissioners leaves much to be desired it becomes apparent that the court below sought to bring the case at hand within the limits of *Cassell* v. *Texas*, 339 U. S. 282. The testimony of the commissioners in the case at bar is entirely different than those in the Cassell case.[4]

In the Cassell case no negroes were on the grand jury involved. In the present case there were three negroes on the petit jury that actually tried respondent. The jury commissioners in Cassell testified that they did not know any negroes they thought were qualified. Here, the jury commissioners said that they were acquainted with many negroes that were qualified and, further, whether they were personally acquainted with them or not, if their names were on the poll tax list they could call them. In the Cassell case, at p. 287, this Court left no doubt as to the basis of its decision when it said:

> Our holding that there was discrimination in selection of the grand jury in this case, however, is based on another ground. In explaining the fact that no Negroes appeared on this grand jury list, the commissioners said that they knew none available who qualified; at the same time they said they

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[4] Commissioner McArthur: testified as follows:

"A. I assumed that any person whose name was on that list of qualified electors could be called as jurors, regardless of color, if his name appeared there, or her name appeared there, if they were qualified to serve and by law we could summon them—and to the best of my ability, and I think I speak for the other two commissioners, our job was to find a representative well qualified jury, and if the person's name appeared there we could call them, white or colored (R.44)."

• • •

"Q. How many Negroes do you know in Pulaski County?"

"A. I really could not say. I've lived here off and on all my life, thirty-eight years, and I'd say I know as much as anyone else in this courtroom, maybe more (R.50)."

• • •

Commissioner Cavin testified:

"Q. Mr. Cavin, was there any special effort made on your part

chose jurymen only from those people with whom they were personally acquainted.

And at p. 290:

> The statements of the jury commissioners that they chose only whom they knew, and that they knew no eligible Negroes . . ., is discrimination in violation of petitioner's constitutional rights.

The evidence in the case at bar shows no such lack of knowledge.

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to acquaint yourself with Negro poll tax holders in Pulaski County?"

"A. No. I feel like I know as many colored people in Pulaski County as any other white person, probably more (R.60)."

• • •

"Q. And did you seek to insure that Negroes would have representation?"

"A. We didn't go down insofar as race, creed, or color. We selected qualified jurors that we thought could serve to the best interest of all concerned."

"Q. And you more or less ignored the fact as to whether or not Negroes would be represented?"

"A. It didn't make any difference whether colored or white (R.62)."

• • •

Commissioner Davis testified:

"Q. At the time that you were selected, about how many Negro poll tax holders did you know in Pulaski County, Arkansas?

"A. I don't know who has poll taxes. I know a great many of the Negro race, but I don't know who has a poll tax and who doesn't (R.88, 89)."

• • •

"Q. Mr. Davis, how long have you lived in Pulaski County?"

"A. Nineteen years."

"Q. Are you fairly well acquainted with both the white and colored race in Pulaski County?"

"A. I think so, a segment of them."

"Q. While in the process of selecting this petit jury, did it make any difference to you whether they were white or colored?"

"A. It didn't (R.93)."

CONCLUSION

It is apparent that the court below has made a new rule in regard to systematic limitation. It is further apparent that it erred in holding, that where there are separate civil and criminal divisions of a circuit court, exclusion of negroes in the civil division has a bearing on the criminal division. For the foregoing reasons we respectfully submit that this petition for a writ of certiorari should be granted.

FRANK HOLT

Attorney General
State of Arkansas

THORP THOMAS

Assistant Attorney General
State of Arkansas

Counsel for Petitioner

June 5, 1961.

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APPENDIX

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 273

LEE HENSLEE SUPERINTENDENT OF THE ARKANSAS STATE PENITENTIARY ——— *Petitioner*

v.

LUTHER BAILEY ——— *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PARAGON PRINTING CO., LITTLE ROCK

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 16,547

Luther Bailey ..... *Appellant*

v.

Lee Henslee, Superintendent of the Arkansas State Penitentiary, *Appellee*

} Appeal from the United States District Court for the Eastern District of Arkansas.

(March 17, 1961)

BEFORE VOGEL and BLACKMUN, Circuit Judges, and DAVIES, District Judge.

BLACKMUN, Circuit Judge.

On January 18, 1960, the Supreme Court of the United States, in *Bailey* v. *Henslee*, 361 U.S. 945, entered the following order:

> "Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied without prejudice to a further application for writ of habeas corpus in the appropriate United States District Court, on the question whether members of petitioner's race were deliberately and intentionally limited and excluded in the selection of petit jury panels, in violation of the Federal Constitution."

Pursuant to this suggestion Luther Bailey, who is the defendant-prisoner concerned and who is now confined in the Arkansas State Penitentiary, petitioned the United States District Court for the Eastern District of Arkansas for a writ of habeas corpus. He based his case on the issue specified by the Supreme Court. After a hearing and the introduction of evidence his petition was denied. *Bailey* v. *Henslee*, E.D. Ark. 184 F.Supp. 298. Judges of this court granted the certificate of probable cause required by 28 USCA §2253 and the appeal is now before us.

Bailey, an adult Negro, was charged by information and convicted by an all-white petit jury in September, 1956, (the March, 1956, term) in the Circuit Court, First Division, Pulaski County, Arkansas, of the crime of rape (as defined in §§41-3401 and 41-3402 of Arkansas Statutes, 1947) committed in Little Rock on June 14, 1956. The jury did not render a verdict of life imprisonment in the state penitentiary at hard labor, as it had the right to do under §§41-3403 and 43-2153, and therefore, in line with the interpretation consistently given §43-2153 by the Supreme Court of Arkansas,[1] Bailey was sentenced to death.[2] Since his conviction and sentence, his case has found its way several times into the appellate courts. We

[1] *Kelley* v. *State*, 133 Ark. 261, 202 S.W. 49, 54; *Clark* v. *State*, 169 Ark. 717, 729, 276 S.W. 849, 853-4; *Smith* v. *State*, 205 Ark. 1075, 172 S.W. 2d 248, 249; *Turner* v. *State*, 224 Ark. 505, 275 S.W. 2d 24, 31.

[2] No date for execution has presently been fixed pursuant to § 43-2623.

set forth in the margin, for background, its step-by-step progress.[3]

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[3] (a) The first state court appeal. Bailey took an appeal from the judgment of conviction. Errors alleged concerned the sufficiency of the evidence, the denial of procedural motions, the reception and exclusion of evidence, and instructions. Most of these are matters not for our present concern. One assignment, however, had to do with the court's alleged error in overruling Bailey's motion "to quash the regular panel and the special panel of the petit jury"; another related to the court's alleged error "in not allowing the Jury Commissioners for the March term 1952 to the March term 1956 inclusive to testify." The Arkansas Supreme Court upheld the refusal to permit testimony from the jury commissioners because (1) they "had not been subpoenaed * * * and were not present", and (2) no offer of proof had been made. It apparently also upheld the denial of the motion to quash because it regarded the deputy clerk's testimony, which was received, as, contrary to the defense's argument, not sufficient to show racial discrimination. All other issues were decided adversely to Bailey and the judgment was affirmed. Two justices would have granted a rehearing on a lesser offense instruction issue. *Bailey* v. *State*, 227 Ark. 889, 302 S.W.2d 796. Certiorari was denied by the United States Supreme Court. *Bailey* v. *Arkansas*, 355 U.S. 851.

(b) The second state court proceeding and appeal. Bailey then filed in the state court a petition for a writ of habeas corpus. He alleged denial of compulsory process as to the jury commissioners, in violation of the Arkansas (Article 2, §10) and the United States (14th Amendment) Constitutions, and systematic limitations of Negroes in the selection of petit juries in the court where he was tried. This petition was amended, however, so that it recited that it was brought under Act 419 of the 1957 Acts of Arkansas (the Uniform Post-Conviction Procedure Act, codified as §§ 43-3101 to 43-3110 of the Arkansas Statutes and later repealed by Act 227 of the 1959 Acts of Arkansas) and that his conviction was void or voidable in that he was denied the right of compulsory process. This revision evidently contained no reference to the issue of systematic limitation of Negroes in the selection of petit jury panels. At the hearing it was shown that prior to the trial the defense had requested the clerk of court to issue subpoenas for the jury commissioners and that the court had refused to allow the clerk to do this. The petition was denied. The Arkansas Supreme Court affirmed on the grounds (1) that the 1957 Act authorized a proceeding to set aside a sentence if "the alleged error has not been previously and finally litigated or waived" and (2) that under the circumstances of the case the compulsory process issue either had been finally litigated on the first appeal or had been waived. *Bailey* v. *State*, 229 Ark. 74, 313 S.W.2d 388. Again certiorari was denied by the United States Supreme Court but this time "without prejudice to an application for a writ of habeas corpus in

We emphasize, initially, that the question of Bailey's guilt is not now before us.[4] This is a situation where, as the United States Supreme Court once described the posture of another Arkansas case, "' * * what we have to deal with is not the petitioners' innocence or guilt but solely the question whether their constitutional rights have been preserved." *Moore* v. *Dempsey*, 261 U.S. 86, 87-8.

While the three of us who have heard the present appeal would naturally be hesitant and disinclined to differ with conclusions reached by the panel (on which one of us

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an appropriate United States District Court". *Bailey* v. *Arkansas*, 358 U.S. 869.

(c) The first federal court proceedings and appeal. Pursuant to this suggestion by the Supreme Court, Bailey filed his second petition for a writ of habeas corpus. This one was presented to the United States District Court for the Eastern District of Arkansas. He alleged violation of his Fourteenth Amendment rights in the trial court's denial of compulsory process. Apparently in this federal proceeding itself there was no request for compulsory process, no witnesses appeared and no offer of proof was made. Judge Henley found that there had been a denial of such process by the state court but nevertheless denied the petition for the writ. He did so on the grounds that a state prisoner, under 28 USCA § 2254, must first exhaust his available state remedies; that this required him to present to the Supreme Court of Arkansas on the first appeal his contention that there was error in the denial of his request for compulsory process; that this issue had not been litigated on the first state appeal and therefore had been waived; and that the attempt to raise the question under the 1957 Act procedure did not constitute an exhaustion of state remedies. *Bailey* v. *Henslee*, E.D. Ark. 168 F.Supp. 314. An appeal was taken to this court on the grounds of deprival of due process, non-waiver, and exhaustion of state remedies. This court, by a unanimous panel, affirmed and held that if there was error in the state court's refusal to have the jury commissioners subpoenaed, that was a matter for proper appeal to the State Supreme Court; that an application for habeas corpus cannot serve as an appeal; and that, not having urged the alleged error on appeal, it was waived and constituted a failure to exhaust state remedies. *Bailey* v. *Henslee*, 8 Cir. 264 F.2d 744. It was by way of response to the defendant's ensuing petition for certiorari (his third) from that action of this court that the order set forth in full at the beginning of this opinion was issue.

[4] The evidence is set forth in the first opinion of the Supreme Court of Arkansas, *Bailey* v. *State*, supra, 227 Ark. 889, 302 S.W.2d 796, and no purpose would be served, even if it were pertinent, in repeating it here. This court has already observed, "The evidence of guilt is without substantial dispute". *Bailey* v. *Henslee*, supra, p. 746 of 264 F.2d.

sat) of this court which heard the first federal appeal in the case, *Bailey* v. *Houshel*, 8 Cir., 264 F.2d 744, and while we agree that the posture of that appeal and the record then before the court clearly called for the affirmance of the District Court's denial of the second petition for a writ of habeas corpus, and for the reasons set forth in that opinion, we are now confronted with the Supreme Court's order of January 18, 1960. We regard that order as a directive authorizing not only a new petition by this defendant but, as well, his making of a new record on the single issue now presented. The record has been made at the hearing and upon the evidence presented to Judge Young on the third and present application for the writ. We must base the conclusion we are now to reach on this new record unencumbered by limitations and shortcomings, if any, which may have characterized the prior record in this long continued litigation. We also regard the Supreme Court's order as a directive requiring us to proceed to the merits of the issue apart from any procedural considerations, such as exhaustion of state remedies, or other concern for orderly administration of criminal justice which thus far seems to have defeated this particular defendant.

Arkansas Statutes, 1947, as amended, provide the method of choosing jury commissioners and jurors.[5] This statutory procedure of course, is followed in Pulaski County. The Circuit Court has a term in that county each September and March. §22-310. As a matter of local practice, the Court there operates in three divisions. The First Division is concerned exclusively with criminal cases. The Second and Third Divisions are concerned with civil cases. Each division has its own jury commissioners and the juries selected by each set of commissioners operate only in the particular division. One exception to this

[5] A poll tax receipt is necessary to qualify a person as an elector. § 3-104.2. The circuit court selects 3 qualified commissioners at each

division practice took place during the March, 1956, term (the one at which the defendant was convicted) when 17 jurors were transferred from the Third Division to the First Division in connection with the trial of Emmett Earl Leggett;[4] afterward they were returned to the Third Division and were not used again in the First Division. This transfer had nothing to do with Bailey's case. Between 1939 and 1956 any juror who was selected for service in either the Second or the Third Division was legally qualified to serve in the First Division.

Most of the pertinent facts having to do with Negro representation on the Pulaski County panels are set forth in the opinion below at 184 F.Supp. 298, as well as in this court's first opinion in 264 F.2d 744, and these facts need not be reviewed in detail here. We mention only that there has been Negro representation, at least since 1952,

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term. § 39-201. The commissioners select from the electors of the county or its subdivision not less than 24 nor more than 36 "persons of good character, of approved integrity, sound judgment and reasonable information" to serve as petit jurors at the next term and, when ordered by the court, additional persons so qualified and not exceeding 12 in number, as alternate petit jurors; these are set forth in *separate* lists which are certified, sealed and delivered to the judge who in turn delivers them to the clerk. §§ 39-208, 39-206 and 39-209. Within the 30 days preceding the next term the clerk opens these lists and delivers copies of them to the sheriff who summons the persons named to attend the term. § 39-210. At the term a petit jury panel of 24 or 36, as the court may direct, is formed from the list of jurors and alternates. § 39-215. The court also directs the commissioners to provide a list of not less than 25 names in addition to the regular panel and alternates for the use of the court in cases where the regular panel may be exhausted in impaneling any jury. §§ 39-220 and 39-220.1. This list is also sealed and is opened when the court determines that a panel cannot be completed from the list of regular and alternate jurors or that it will be exhausted. § 39-221. If it becomes evident that the special panel should be supplemented the court may recall the jury commissioners to perform this task. § 39-221.1. A person who has served on a regular panel of the petit jury is ineligible (with certain exceptions not pertinent here) to serve again for a period of 2 years. § 39-225. A prospective juror may be challenged for cause. § 39-228. Each party to a lawsuit has three peremptory challenges. § 39-229.

[4] See *Leggett* v. *State*, 227 Ark. 393, 299 S.W.2d 59.

on the regular panels of the First Division; that there has been no (or, at the most, one) instance of Negro representation on the alternate panels; that there is no positive evidence of any Negro representation on the special panels; that since 1939 no Negro has served on any panel in the Second and Third Divisions; and that there has been, to an extent at least, some designation of race in the jury records. Bailey's Exhibit 1, to which reference is made in Judge Young's Table, p. 301 of 184 F.Supp., also covers the 4 years from September, 1956, through March, 1960, and would show race representation for the court terms held during that period. Specifically, that exhibit (which the parties stipulated sets forth facts to which the present Deputy Clerk would have testified if called) shows the presence of from one to three Negroes on the regular panel in each of these later terms, the identity of all Negroes who have served since 1952, and the absence of any Negro's name among the alternates.[7]

So much for the facts. In turning to the legal aspects of the case, we feel that a preliminary review of established principles is in order:

The right of a defendant in a criminal prosecution to a trial "by impartial jury" is guaranteed by Article 2,

[7] We recognize that the parties are not in accord as to the propriety of jury selection evidence here for the period after the March, 1956, term. (While the State objected to the post-March 1956 data, the court reserved ruling on that objection; the record itself discloses the making of no formal ruling thereafter. Judge Young's Table does not embrace this data.) There is no question of the propriety of this kind of evidence for a suitable period before that term to the extent it bears upon the alleged plan of exclusion or limitation. *Patton* v. *Mississippi*, 332 U.S. 463, and other cases cited in Footnote 10, infra. We are not here concerned with the question whether intent as a factor in crime is properly proved by evidence of prior acts of a kindred character. See, for example, *Kansas City Star Company* v. *United States*, 8 Cir. 240 F.2d 643, 650-1, cert. den. 354 U.S. 923. Instead, we are here concerned with a pattern of jury selection which bears upon constitutional aspects of a criminal trial. We feel that it is not improper for us to consider, for what it is worth, any evidence which, coupled and consistent with that as to prior terms, tends to show a pattern in jury selection. This,

Section 10, of the Constitution of the State of Arkansas.[8] When a right to a jury trial exists,[9] then, as was emphasized many years ago by the United States Supreme Court, a jury's proper composition is fundamental:

> "(T)he constitution of juries is a very essential part of the protection such a mode of trial is intended to secure. The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds." *Strauder* v. *West Virginia*, 1879, 100 U.S. 303, 308.

Strauder and a long line of succeeding Supreme Court cases hold that discrimination on the basis of race or ancestry in the selection of persons for service on grand or petit jury panels is violative of the equal protection clause of the Fourteenth Amendment.[10] A federal statute supplements this rule. 18 USCA §243. This does not mean, however, that a jury must have proportional representation of races in order to assure the equal protection of the laws. *Virginia* v. *Rives*, 100 U.S. 313, 322-3; *Akins* v. *Texas*, 325 U.S. 398, 403. Proportional racial limitation as such is forbidden. *Cassell* v. *Texas*, 339 U.S. 282, 286-7.

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we think, is demanded by the nature and possible result of this particular case, namely, the constitutionality of jury selection and the capital punishment which may befall the defendant.

[8] *Anderson* v. *State*, 200 Ark. 516, 139 S.W.2d 396, 398; *Lane* v. *State*, 168 Ark. 528, 270 S.W. 974, 975.

[9] The Fourteenth Amendment, of course, does not compel a state to provide trial by jury. *Snyder* v. *Massachusetts*, 291 U.S. 97, 105; *Palko* v. *Connecticut*, 302 U.S. 319, 324, *Fay* v. *New York*, 332 U.S. 261, 288.

[10] *Neal* v. *Delaware*, 103 U.S. 370, 394, 397; *Bush* v. *Kentucky*, 107 U. S. 110; *Gibson* v. *Mississippi*, 162 U.S. 565; *Carter* v. *Texas*, 177 U.S. 442 447; *Rogers* v. *Alabama*, 192 U.S. 226, 231; *Martin* v. *Texas*, 200 U.S. 316, 321; *Norris* v. *Alabama*, 294 U.S. 487, 589; *Hollins* v. *Oklahoma*, 295 U.S. 394; *Hale* v. *Kentucky*, 303 U.S. 613, 616; *Pierre* v. *Louisiana*, 306 U.S. 354; *Smith* v. *Texas*, 311 U.S. 128, 129-30; *Hill* v. *Texas*, 316 U.S. 400; *Akins* v. *Texas*, 325 U.S. 398, 400; *Patton* v. *Mississippi*, supra, p. 465 of 332, U.S.; *Brunson* v. *North Carolina*, 333 U.S. 851; *Cassell* v. *Texas*, 339 U.S. 282; *Ross* v. *Texas*,

A defendant has no right even to have his race represented on his jury.[11]

> "What an accused is entitled to demand, under the Constitution of the United States, is that in organizing the grand jury as well as in the empaneling of the petit jury, there shall be no exclusion of his race, and no discrimination against them, because of their race or color". *Martin* v. *Texas*, 200 U.S. 316, 321.

Furthermore, inequality or disproportion in the number finally selected does not in itself show discrimination. *Akins* v. *Texas*, *supra*, p. 403 of 325 U.S.

Discrimination in a jury's selection must of course be proved; it is not to be presumed. *Tarrance* v. *Florida*, 188 U.S. 519, 520. The burden of establishing the discrimination is upon the defendant. *Akins* v. *Texas*, *supra*, p. 400 of 325 U.S. He may, however, establish a *prima facie* case of discrimination of this kind and, if he does, the burden then passes to the state to refute the discrimination. Evidence that Negroes have *never* served on a jury in the county or parish has been held to make a *prima facie* case.[12] Such a case is established where race differentiating tickets are used to identify jurors and no Negro

341 U.S. 918; *Brown* v. *Allen*, 344 U.S. 443, 470; *Avery* v. *Georgia*, 345 U.S. 559; *Hernandez* v. *Texas*, 347 U.S. 475; *Reece* v. *Georgia*, 350 U.S. 85, 87; *Eubanks* v. *Louisiana*, 356 U.S. 584, 585. See *Carruthers* v. *Reed*, 8 Cir., 102 F.2d 933, 939, cert. den. 307 U.S. 643. Note *Anderson* v. *State*, . . . Ala. App. . . ., 120 So. 2d 397, cert. den. 270 Ala. 575, 120 So.2d 414, cert. granted 364 U.S. 877.

There have also been suggestions that it is violative of due process, *United States* v. *Harpole*, 5 Cir., 263 F.2d 71, 81, cert. den. 361 U.S. 838, 850; *Wong Yim* v. *United States*, 9 Cir., 118 F.2d 667, 669, cert. den. 313 U.S. 589. See *Fay* v. *New York*, supra, p. 284 of 332 U.S., note 27; *Hill* v. *United States*, C.A.D.C., 168 F.2d 161, 164, cert. den. 334 U.S. 853.

[11] *Neal* v. *Delaware*, supra, p. 394 of 103 U.S.; *Bush* v. *Kentucky*, supra, p. 117 of 107 U.S.; *Akins* v. *Texas*, supra, p.403 of 325 U.S.

[12] *Neal* v. *Delaware*, supra, p. 397 of 103 U.S.; *Norris* v. *Alabama*, supra, p. 593 of 294 U.S.; *Pierre* v. *Louisiana*, supra, p. 361 of 306 U.S.; *Hill* v. *Texas*, p. 404 of 316 U.S.; *Patton* v. *Mississippi*, p. 466 of 332 U.S.; *United States* v. *Harpole*, supra, pp. 77-8 of 263 F.2d. See *Hernandez* v. *Texas*, 347 U.S. 475

is selected in a panel of 60. *Avery* v. *Georgia*, 345 U.S. 559. The presence on the panel of a few Negroes who would probably be disqualified does not constitute sufficient rebuttal of the *prima facie* case. *Reece* v. *Georgia*, *supra*, p. 88 of 350 U.S. Testimony of non-discrimination expressed in generalities is not sufficient to rebut.[13] Discriminatory selection in prior years does not nullify a present conviction if the selection of the jury for the current term is on a proper basis. "Former errors cannot invalidate future trials". *Brown* v. *Allen*, 344 U.S. 443, 479.[14]

A state's restriction in the selection of jurors to males, freeholders, citizens, persons within certain ages, or those having educational qualifications, has been held not to violate the Fourteenth Amendment. *Neal* v. *Delaware*, 103 U.S. 370, 386; *Gibson* v. *Mississippi*, 162 U.S. 565, 580. A restriction to those whose names appear on the tax list has been similarly upheld. *Brown* v. *Allen*, *supra*, p. 474 of 344 U.S.

In avoiding racial discrimination in the selection of jurors it is not enough for the jury commissioners or any other selecting agency to be content with persons of their personal acquaintance. *Smith* v. *Texas*, 311 U.S. 128, 132; *Hill* v. *Texas*, 316 U.S. 400, 404. It is "their duty to familiarize themselves fairly with the qualifications of the eligible jurors in the county without regard to race and color". *Cassell* v. *Texas*, *supra*, p. 289 of 339 U.S.

Although the question whether racial discrimination exists has been said to be a question of fact, this does not

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[13] *Norris* v. *Alabama*, supra, p. 598 of 294 U.S.; *Hernandez* v. *Texas*, supra, pp. 481-2 of 347 U.S.; *Reece* v. *Georgia*, p. 88 of 350 U.S.; *Eubanks* v. *Louisiana*, supra, p. 587 of 356 U.S.

[14] See also *Washington* v. *State*, 213 Ark. 218, 210 S.W.2d 307, 309, cert. den. 335 U.S. 884; *Green* v. *State*, 222 Ark. 222, 258 S.W.2d 56, 59; *Moore* v. *State*, 279 Ark. 335, 315 S.W. 2d 907, 911, cert. den. 358 U.S. 946.

relieve a federal court of the duty to make independent inquiry and to determine whether a federal right has been denied.[15]

The Supreme Court of Arkansas itself has recognized these principles and has done so both in opinions affirming convictions against the challenge of unconstitutionality and in opinions reversing.[16]

Our task here is to apply these principles to the facts before us. We should note, however, what we are *not* now concerned with: (1) There is no contention here that the Arkansas Constitution or statutes themselves authorize any discrimination on account of race in the selection of jurors. (2) There is no contention here that the statutory provision that jurors be "persons of good character, of approved integrity, sound judgment and reasonable information" is improper. (3) There is no complaint here resting on the fact that the charge against the defendant was by information rather than by indictment.[17] (4) There appears to be no contention on this appeal that the stipulated fact that since 1938 no Negro has ever been a

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[15] *Norris* v. *Alabama*, supra, pp. 589-590 of 294 U.S.; *Pierre* v. *Louisiana*, supra, p. 358 of 306 U.S.; *Smith* v. *Texas*, supra, p. 130 of 311 U. S.; *Akins* v. *Texas*, supra, p. 402 of 325 U.S.; *Patton* v. *Mississippi*, supra, p. 466 of 332 U.S.; *Cassell* v. *Texas*, supra, p. 283 of 339 U.S.; *Avery* v. *Georgia*, supra, p. 561 of 345 U.S.; *Napue* v. *Illinois*, 360 U.S. 264, 272.

[16] *Affirming*: *Smith* v. *State*, 218 Ark. 725, 238 S.W. 2d 649, 653; *Washington* v. *State*, supra, p. 310 of 210 S.W.2d; *Dorsey* v. *State*, 219 Ark. 101, 240 S.W.2d 30, cert. den. 342 U.S. 851; *Moore* v. *State*, supra, pp. 910-12 of 315 S.W.2d; *Payne* v. *State*, 226 Ark. 910, 295 S.W.2d 312, 317-18, reversed on other grounds, 356 U.S. 560, 568-9; *Williams* v. *State*, 229 Ark. 1022, 322 S.W.2d 86, 90. Cf. *Brown* v. *State*, 213 Ark. 989, 214 S.W.2d 240, and *Tasling* v. *State*, 69 Ark. 189, 62 S.W. 584. *Reversing*: *Castleberry* v. *State*, 69 Ark. 346, 63 S.W. 670; *Ware* v. *State*, 146 Ark. 321, 225 S.W. 626, 631; *Bone* v. *State*, 198 Ark. 519, 129 S.W.2d 240, 244; *Hanaway* v. *State*, 202 Ark. 845, 153 S.W.2d 161, 163; *Maxwell* v. *State*, 217 Ark. 691, 232 S.W.2d 982; *Green* v. *State*, supra, p. 78 of 258 S.W.2d.

[17] See *Hurtado* v. *California*, 110 U.S. 516, 538; *Gaines* v. *Washington*, 277 U.S. 81, 86; *Moore* v. *Hendrix*, 8 Cir., 276 F.2d 876, 878.

jury commissioner in Pulaski County is itself unconstitutional discrimination.[18] (5) There is no contention here that the use of peremptory challenges to eliminate representatives of a defendant's race is improper.[19] (6) And there is no contention here that the Pulaski County three division system itself, with its separate sets of jury commissioners and panels, is invalid.

While the cited authorities establishing the general principles which govern here are numerous, four of the Supreme Court decisions afford special guidance for this case:

1. *Norris* v. *Alabama*, 294 U.S. 587. The jury commissioners, through their clerk, prepared a preliminary list of all males between stated ages as prescribed by statute. However, the designation "col."; was placed after the names of Negroes on the list. The final grand jury roll was compiled from this list. There was testimony, which the court found acceptable and not overcome, that there were Negroes in the county qualified to serve. *No Negro, however, had been called for many years.* Similar practices appeared with respect to the selection of the petit jury in another county where the trial took place. The court held that testimony of non-discrimination by way of generalities was not sufficient to overcome the "strong *prima facie* case". The Negro defendant's rape conviction was reversed.

2. *Smith* v. *Texas*, *supra*, 311 U.S. 128. Over 3,000 Negroes of the county met the qualifications prescribed by

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[18] In any event, this point has been decided by this court adversely to the defense in the recent case of *Moore* v. *Henslee*, supra, p. 879 of 276 F.2d, and we adhere to that holding. See also *Maxwell* v. *State*, supra, 217 Ark. 691, 232 S.W.2d 982, 983, and *Payne* v. *State*, *supra*, 226 Ark. 910, 295 S.W.2d 312, 317. We do not regard the incidental references to jury commissioners (as well as to grand and petit jurors) in *Hernandez* v. *Texas*, supra, pp. 476 and 481 of 347 U.S., as indicative of a contrary attitude on the part of the Supreme Court.

[19] See *Hall* v. *United States*, supra, p. 164 of 168 F.2d.

the state statutes for grand jury service. In a 7-year period, however, only 5 of 384 grand jurors, who served were Negroes. Of the persons called for grand jury duty only 18 were Negroes and of these the names of 13 appeared last on the 16 man lists; the custom was to select the first 12 on the list. *Of the 5 called who were not given No. 16, 4 were placed between Nos. 13 and 16 and one was No. 6. One of the 5 Negroes who served did so 3 times so only 3 individual Negroes served at all during the 7-year period.* The court held that chance and accident alone could not have brought about a listing of so few or been responsible for the numbering circumstances surrounding the names. The Negro defendant's rape conviction was reversed.

3. *Avery* v. *Georgia*, *supra*, 345 U.S. 559. Jury commissioners selected prospective jurors from county tax returns. *The names of white persons so selected were printed on white tickets and the names of Negroes on yellow tickets.* A drawing was then made from a jury box. The tickets drawn were handed to a sheriff. He gave them to a clerk who arranged the tickets and typed up the final list of persons to serve. The judge who picked out the tickets testified that he practiced no discrimination. *However, no Negro was selected to serve on a panel of 60.* It was conceded that Negroes were available for jury service. The Negro defendant's rape conviction was reversed. Mr. Justice Frankfurter, in concurring, said, p. 564:

> ". . . (O)pportunity for working of a discriminatory system exists whenever the mechanism for jury selection has a component part, such as the slips here, that differentiates between white and colored; such a mechanism certainly cannot be countenanced when a discriminatory result is reached. The stark resulting phenomenon here was that somehow or other, despite the fact that over 5% of the slips

were yellow, no Negro got onto the panel of 60 jurors from which Avery's jury was selected. The mind of justice, not merely its eyes, would have to be blind to attribute such an occurrence to mere fortuity."[20]

4. *Eubanks* v. *Louisiana*, 356 U.S. 584. A jury commission made up a grand jury list of not less than 750 persons meeting the qualifications prescribed by the state statutes. Twice each year the commissioners drew the names of 75 persons from that group. This smaller list was then submitted to one of the criminal court judges who chose a new grand jury of 12 every six months. Some of these judges interviewed prospective jurors; others made the selection on the basis of personal knowledge or reputation. *However, the evidence showed that only one Negro had been picked for grand jury duty within memory; that this one instance apparently resulted from a mistaken impression that he was white;* that Negroes comprised about one-third of the population of the parish; that there was a substantial number of qualified Negroes; that since 1936 Negroes were included on each list submitted to the judges; and that *for the following 18 years only the single Negro was chosen.* The Negro defendant's murder conviction was reversed.

In the light of these decisions, this case may be a close one. On the one hand, there is no dispute that, whatever may have been the pre-1953 situation, there has been representation of the Negro race on the regular petit jury panel in each of the terms which have come and gone in the Pulaski County Circuit Court, First Division, from March, 1953, through March, 1960. The actual number of Negroes has varied from one to three.[21] There were at

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[20] See, also *Brown* v. *Allen*, supra, p. 480 of 344 U.S., and *Williams* v. *Georgia*, 349 U.S. 375, 382.

[21] While there is some disagreement in the evidence as to the exact Negro representation on certain of the panels under review, we agree

least 31 instances of a Negro juror on the regular panel of the 15 terms during the 7½-year period. One Negro may also have been named among the alternates for the September, 1954, term. Obviously, then, there has been no *exclusion*, systematic, studied or otherwise, of Negroes from regular jury panels in the criminal division since 1952.

On the other hand, the record discloses the presence of the following:

1. Since 1939 no Negro has ever served on any kind of panel, regular, alternate or special, in the *Second* or *Third* Divisions of the Pulaski County Circuit Court. A fact of this kind, as has been noted above, would support a conclusion that a *prima facie* case of discrimination in the selection of juries in these civil divisions has been established.

2. The First Division's panels of alternates, from 1952 to *1960*, with one possible exception, contained no Negro name. Here again it can be said that this fact creates an unrebutted *prima facie* case of discrimination in the selection of these *alternates*.

3. The 5 special panels assembled for the March, 1956, term in the First Division, which contained an aggregate of approximately 450 names, included, according to the stipulated Exhibit 1, the name of no Negro.[22]

4. Fourteen of the persons on the defendant's own petit jury panel of 37 names came from those 2 special

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with Judge Young's observation, p. 301 of 184 F.Supp., that the discrepancies are probably more apparent than real.

[22] There is some indication that certain of these special panel lists were not opened. It is clear, however, that 2 were opened, that these contained about 199 names, and that the name of no Negro was included. This substantial number of special panel jurors was not occasioned by the Bailey litigation but by the Leggett murder case noted above. Leggett was white and we are not concerned here with any problem of his constitutional rights in jury selection. See *Haraway* v. *State*, 203 Ark. 912, 159 S.W.2d 733, cert. den. 317 U.S. 648; *Fay* v.

panels consisting exclusively of white persons. In a not dissimilar situation the Supreme Court of Arkansas has said:

> "The State contends, and not without attention-compelling force, that commingling of the original thirteen jurors with the panel containing Negroes gave to the defendant in principle the identical opportunity he was contending for: that is, the right to select twelve names from a list partially composed of members of his race. The answer is that we are dealing primarily with the Constitution as distinguished from a particular defendant. * * * But there is no doubt that the local system of jury selection resulted in systematic exclusion of Negroes in violation of the Fourteenth Amendment, * * *
>
> "Our own cases, and decisions by the Supreme Court of the United States, are too clear for misunderstanding." *Maxwell* v. *State*, 217 Ark. 691, 232 S.W. 2d 982, 983.

5. Over the years presented no more than 3 Negroes appeared in any regular panel of 24 persons. At the most (6 of 15 times) therefore, Negroes have represented one-eighth of the total. This is a little less than what the evidence seems to show, at least for 1954 and 1955, to be the proportion between the races for persons holding the qualifying poll tax receipts.[23] *We recognize, of course, that mere lack of identity in proportions is not in itself unconstitutional.*[24]

New York, supra, p. 287 of 332 U.S.; *Griffin* v. *State*, 183 Ga. 775, 190 S.E. 2, 4; *State* v. *Lea*, 228 La. 724, 84 So.2d 169, 171, cert. den. 350 U.S. 1007; *State* v. *Dierlamm*, 189 La. 544, 180 So. 135, 136; *Nanfito* v. *United States*, 8 Cir., 20 F.2d 376, 378.

[23] See 264 F.2d 744, 745. There is some testimony to the effect that the stated percentage figures between whites and Negroes is little more than "a pure and simple guess."

[24] *Virginia* v. *Rives*, supra, pp. 322-3 of 100 U.S.; *Akins* v. *Texas*, supra, p. 403 of 325 U.S.

6. There is an unexplained and seemingly unusual amount of repetition of the names of Negroes which do appear on the regular panels from 1953 to 1960 and which in the aggregate made up the 31 instances. A. E. Nabors, who was named in September, 1955, was named again in September, *1957*, and in *March, 1960*. D. B. Lacefield, who was named in September, 1955, was also named in March, *1958* and *March, 1960* (he had been named, too, in March, 1951). Simon Herron, who was named in March, 1956, was also named in *September, 1958*. W. E. Hayes, who was named in September, 1955, was named again in March, 1959. I. S. McClinton, who was named in *March, 1957*, was also named in *September, 1959* (he had been named, too, in March, 1951). Vilma T. Nabors, who was named in September, 1956, was the wife of A. E. Nabors. The 31 names for the 1953-60 period thus come down to only 24 different persons and 2 of these are husband and wife.[25]

7. The Pulaski County poll tax receipts were given racial marks. They contained a "C" when the holders were known to be colored and a "W" when they were known to be white. Where race was unknown, as was often the case when payment of the tax was made by mail, they were marked "W".[26]

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[25] For the period prior to the term during which the defendant was convicted repetition of a Negro's name apparently occurred only once.

[26] As to this the County Tax Collector testified:

"* * * We do not feel that a colored person, in the majority of instances, would feel offended if they got back a poll tax marked 'W', where on the other hand, it is completely reversed, if a white person would get back a poll tax receipt through the mail marked 'colored', they would have a great resentment. * * *"

[27] The following appears with respect to Commissioner McArthur:

"Q. (Mr. Williams, resuming) How many Negroes do you know in Pulaski County?

"A. I really couldn't say. I've lived here off and on all my life, thirty-eight years, and I'd say I know as much as anyone else in this court-room, maybe more."

* * * * * * *

"Q. My question was whether or not there was any effort made to acquaint yourself with Negro poll tax holders, any special effort

8. The jury commissioners, except, perhaps, for two terms, themselves identified names of Negroes on the lists by the designation "(C)" or "(Col)" or "(Colored)". Why this was done does not appear. There is testimony, as is usually the situation in these cases, that this was of no persuasion so far as the jury commissioners were concerned.

9. The testimony of the jury commissioners as to their efforts to ascertain the names of qualified Negroes leaves much to be desired.[27]

The foregoing facts, taken in the aggregate, lead us to the conclusion that a *prima facie* case of limitation of members of the Negro race in the selection of this defendant's petit jury panel was established, that the State did not rebut it, and that the District Court's conclusion to the contrary was clearly erroneous. Here there appears to be a difinite pattern of race selection; here there is a device for race identification with its possibility of abuse; here there is exclusion from the alternate panels and from the special panels actually used; here there is an element of recurrence of the same Negro names; and here there is the additional factor, for what atmosphere it may provide, of exclusion from the civil divisions' panels.

Our determination that the procedure followed in the defendant's trial does not measure up to the standards of

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outside of the deliberation?

"A. My answer would be no. If they were on the list of qualified electors, they were qualified as far as we were concerned, white or colored.

"Q. You made no special effort?

"A. No special effort."

As to Commissioner Cavin, the following took place:

"Q. Mr. Cavin, was there any special effort made on your part to acquaint yourself with Negro poll tax holders in Pulaski County?

"A. No. I feel like I know as many colored people in Pulaski County as any other white person, probably more."

With respect to Commissioner Davis, the following took place:

the equal protection clause of the Fourteenth Amendment of the Constitution of the United States, as interpreted by the Supreme Court, does not mean that he need go free. The State of Arkansas is at liberty to try him again upon the same information by procedure which meets constitutional requirements. That this may result in further time consuming proceedings, both trial and appellate, before there can be an end to Bailey's case, is, of course, regrettable. Long delays in the attainment of an ultimate decision "may show a basic weakness in our government system",[28] may present "a sorry chapter",[29] and may be exasperating at times. Nevertheless, it is to the credit and not to the shame of our system that, no matter what the alleged crime may be, a defendant in this nation will receive a trial conducted with the safeguards guaranteed by our fundamental law. The Fifth Circuit recently said: "The very heinousness of the crime and the weight of the physical evidence made it all the more necessary that the defendant's constitutional rights be not lightly or madvisedly surrendered". *United States* v. *Harpole*, 5 Cir., 263 F.2d 71, 83, cert. den. 361 U.S. 838, 850. Mr. Chief Justice Stone summarized the situation in *Hall* v. *Texas*, *supra*, p. 406 of 316 U.S.:

> "A prisoner whose conviction is reversed by this Court need not go free if he is in fact guilty, for Texas may indict and try him again by the procedure which conforms to constitutional require-

"Q. Mr. Davis, you did not make any special effort to see that Negroes were represented on this jury panel, did you?
"A. No special effort either way.
"Q. You didn't make any special effort?
"A. Either way.

The Court:

"'Either way'—I (don't) think I know what you mean, Mr. Davis. Will you explain that——
"A. I didn't make any effort to put them on or not to put them on."

[28] See *Chessman* v. *Dickson*, 9 Cir. 1960, 275 F.2d 604, 607.

[29] See *Chessman* v. *Teets*, 354 U.S. 156, 164.

> ments. But no State is at liberty to impose upon one charged with crime a discrimination in its trial procedure which the Constitution, and an Act of Congress passed pursuant to the Constitution, alike forbid. Nor is this Court at liberty to grant or withhold the benefits of equal protection, which the Constitution commands for all, merely as we may deem the defendant innocent or guilty * * * It is the State's function, not ours, to assess the evidence against a defendant. But it is our duty as well as the State's to see to it that throughout the procedure for bringing him to justice he shall enjoy the protection which the Constitution guarantees. * * * Equal protection of the laws is something more than an abstract right. It is a command which the State must respect, the benefits of which every person may demand. ,Not the least merit of our constitutional system is that its safeguards extend to us all—the least deserving as well as the most virtuous."

The State of Arkansas is entitled to a reasonable time within which to retry this defendant for the crime charged against him. Pending a retrial by the State, the District Court is directed to grant a stay of execution. If he is retried, the Court is directed to enter a dismissal of Bailey's present petition for release on habeas corpus. If he is not retried within nine months from the filing date of this opinion, the District Court is directed to grant Bailey's petition for a writ of habeas corpus.

The judgment appealed from is reversed and the case is remanded for further proceedings consistent with this opinion.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

JUDGMENT

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 16,547—September Term, 1960

Luther Bailey ..... Appellant

v.

Lee Henslee, Superintendent of Arkansas State Penitentiary

APPEAL FROM the United States District Court for the Eastern District of Arkansas.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed.

And it is further Ordered by this Court that this cause be, and the same is hereby, remanded to the said District Court for further proceedings consistent with the opinion of this Court filed this day.

March 17, 1961.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 61547—September Term, 1960

Luther Bailey ..... Appellant) Appeal from the United
v.) States District Court
Lee Henslee, Superintendent of) for the Eastern District
Arkansas State Penitentiary) of Arkansas

Petition of appellee for rehearing filed in this cause, and also motion of appellant to disregard the petition for rehearing, having been considered by the Court, It is now here Ordered that the petition of appellee for rehearing be, and it is hereby, denied.

May 4, 1961.

IN THE

United States District Court

EASTERN DISTRICT OF ARKANSAS

WESTERN DIVISION

LUTHER BAILEY — *Petitioner*

v. — No. LR 60 C 25

LEE HENSLEE, Superintendent of Arkansas State Penitentiary — *Respondent*

MEMORANDUM OF DECISION

This is a petition for a writ of habeas corpus by the petitioner, Luther Bailey, a Negro under sentence of death by the State of Arkansas for the crime of rape committed on a white woman June 14, 1956. Petitioner was tried upon this charge, convicted and sentenced in September of 1956.

I

It is the petitioner's contention here (as modified by stipulation of his counsel read into evidence):

(1) That Negroes were limited unduly and purposely in the selection of the members of the jury panel for the First Division (criminal) of the Pulaski County Circuit Court during the March, 1956, term, and that such practice was the systematic plan for all jury commissioners from 1938 through the March, 1960, term;

(2) No Negro jury commissioner had ever been appointed by any judge of the Pulaski County Circuit Court;

(3) There has been an intentional and systematic exclusion of Negroes to serve on the jury panel selected in the Second and Third Divisions (civil) of the Pulaski County Circuit Court, and that during the March, 1956, term, 17 special jurors were called on one case (not that of petitioner) in the First, or Criminal, Division of the Court. (Note 1.)

(4) These alleged facts violate the Constitutional rights of the petitioner under the Fourteenth Amendment to the United States Constitution.

An order to show cause was issued to respondent upon this petition, upon which hearings were held on both April 1, and April 12, 1960. Evidence was received from the witnesses called by petitioner, who included the three jury commissioners for the March, 1956, term of the First Division court, the term in which petitioner was tried. The court also considered the records, transcripts of testimony, and prior reported history, state and federal, of petitioner's trial and subsequent appeals. Upon this consideration of the petition, it is the decision of this court that petitioner has failed to prove his allegation of racial discrimination, either by exclusion or by limitation, in the selection of the petit jury panels. The petition for writ of habeas corpus is denied.

II

After his conviction in September of 1956, petitioner appealed to the Arkansas Supreme Court, which affirmed.

NOTE 1: The Circuit Court of Pulaski County is divided into three divisions. The First Division, in which petitioner was tried, tries only criminal cases. The Second and Third Divisions handle the civil docket.

Bailey v. *State*, 227 Ark. 889, 302 S.W. 2d 796 (1957). The Supreme Court of the United States denied certiorari. 355 U. S. 851 (1957).

Bailey's present counsel was appointed to represent him by the Pulaski County Circuit Court more than a month before his trial. On the morning of the trial, his attorney filed a motion to quash the panel of regular and special panel of petit jurors for the alleged reason that the jury commissioners of the trial court in Pulaski County had purposely limited and restricted the number of Negroes serving on any petit jury panel from the years 1952 through 1956, and particularly as to the March, 1956, term had selected only three Negroes out of the total of 36 selected to serve on the regular jury panel, and no Negroes out of 100 selected to serve on the special jury panel; and that such discrimination violated the Fourteenth Amendment. (Original trial transcript, pages 14-18.)

Petitioner then filed a petition for a writ of habeas corpus in the court of his conviction, alleging denial of compulsory process and systematic limitation of Negroes on the petit jury panel. His petition was later amended to raise only the question of denial of compulsory process.

Upon denial of his petition, Bailey again appealed to the Supreme Court of Arkansas, but the Court held that the point involved (denial of compulsory process) must necessarily have been raised and litigated, or waived, in the original trial proceedings. *Bailey* v. *State*, 313 S.W. 2d 388 (Ark. 1958). Certiorari was denied by the United States Supreme Court, 358 U.S. 869 (1958), "without prejudice to an application for a writ of habeas corpus in an appropriate United States District Court".

Then Bailey applied for a writ of habeas corpus in this court before J. Smith Henley, J. The basis for the writ was the claim that Bailey was denied compulsory process for obtaining witnesses in his favor in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Upon hearing of that petition, no compulsory process for attendance of witnesses was requested by Bailey, nor were witnesses, offers of proof, affidavits or other forms of additional proof introduced. The petition was denied. *Bailey* v. *State*, 168 F.Supp. 314 (E.D. Ark. 1958).

Petitioner Bailey's appeal of the lower court's denial of his petition was affirmed by the Eighth Circuit Court of Appeals. 264 F.2d 744 (1959). That court, in its opinion, held that there was nothing to indicate that the jury commissioners excluded Negroes from the petit jury panel, and that no offer of testimony had been made by petitioner to support this allegation.

The court said, p. 748:

> "After having made his record in the trial court, appellate (Bailey) deliberately omitted urging the question which he now seeks to urge, either in his motion for new trial or on appeal."

Petitioner again appealed to the United States Supreme Court, but certiorari was denied, 361 U. S. 945 (1960).

> "without prejudice to a further application for writ of habeas corpus in the appropriate United States District Court, on the question whether members of petitioner's race were deliberately and intentionally limited and excluded in the selection of petit jury panels, in violation of the Federal Constitution."

Shortly thereafter, Bailey filed this petition for a writ of habeas corpus with this court.

III

It is true that such adverse State determinations, with the subsequent denials of certiorari by the United States Supreme Court, or the previous petition for habeas corpus denied by this court, does not prevent this court's reception of evidence or its evaluation of the prior record in determining the asserted federal grounds for habeas corpus. *Brown* v. *Allen*, 344 U. S. at 458, 497-513. Nor can it be said to be *res adjudicata*, as the cases demonstrate.

IV

It was admitted by respondent upon petitioners' request that:

(a) No Negro has served as a jury commissioner in Pulaski County since 1938.

(b) No Negro has served on a petit jury panel in the Third Division (civil) of the Pulaski County Circuit Court since 1948.

The following table (referred to as Table 1) has been prepared from the complete record before the court to allow a comparison of the various allegations and testimoney concerning Negro representation on the petit juries. The table reveals that most of the discrepancies in the evidence before the court are more apparent than real when considered against the complete record.

TABLE OF NEGRO JURORS
FIRST DIVISION (CRIMINAL) OF PULASKI CIRCUIT COURT
MARCH 1952 THROUGH MARCH 1956 COURT TERMS

	ALLEGATIONS OF NOTICE TO CHARLIE PANEL 9/19/56	TESTIMONY OF COURT CLERK 9/19/56		BAILEY'S EXHIBIT NO. 1 4/1/60		CORRECTIONS TO EXHIBIT NO. 1	
		Ordinary	Special	Regular	Alternate	Regular	Alternate
March 1952	2	2		0	0		
September 1952	1	1		0	0		
March 1953	2	2		2	0		
September 1953	3	2	3 of 50; 0 of 5 of 21 (NOTE 2)	1	0		
March 1954	2	2	0 of 5 of 24 (NOTE 3)	1	0	2	0 (Corrected by)Restock
September 1954	2	2	0 of 7 of 100 (NOTE 4)	1	0	1	1 (4/12/60
March 1955	3	3	4 of 100, one person called (NOTE 5)	3	0		
September 1955	3	3	0 of 1 of 100 (NOTE 6)	3	0		
March 1956	3 (NOTE 1)	3	(See NOTE 7)	2	0	3	(Corrected by (stipulation of (counsel 4/1/60

NOTE 1. Alleged that no Negroes selected out of the "100" on the special panel for the March 1956 term. Further alleged that there had never been more than four Negroes on a petit jury panel, and that only once.

NOTE 2. Three Negroes on special panel of 50. A supplemental panel of 21 names was made, from which five persons were called, none of them were Negroes. No indication of race of those not called.

NOTE 3. Special panel of 24, from which five persons were called, all of them were white. No indication of race of those not called.

NOTE 4. Special panel of 100, from which seven persons were called, all of them were white. No indication of race of those not called.

NOTE 5. Special panel of 100, four of them were Negroes. One person, white, served from this panel.

NOTE 6. Special panel of 100, from which one person, white, served.

NOTE 7. A total of five special panels, with approximately 400 names, were selected. Apparently none were Negroes. It is uncertain how many were actually called. Fourteen on the first two special panels were called in the Bailey case. Eighteen persons from the Third Division Panel were used for the LEGGETT trial, none of them were Negroes.

v

Though petitioner was not entitled to any percentage of racial representation on the jury panel which tried him, or to representation, as such, at all, there must be neither inclusion nor exclusion because of race. To comply with the Constitutional requirement as to selection of jurors, race is an irrelevant factor. *Cassell* v. *Texas*, 339 U. S. 282, 287, 294 (concurring opinion) (1950); *Akins* v. *Texas*, 325 U.S. 389, at 407 (Murphy, J. dissenting (1945).

The federal court, however, does not serve as supervisor of jury commissioners in the performance of their duty. The court recognizes conscious decisions must be made in any system of jury selection not based upon pure chance, that practical considerations must necessarily be heeded, and that in any large county jury commissioners must of necessity have a somewhat limited acquaintance with most of the people eligible for jury duty. In Pulaski County, the largest in the State of Arkansas, there were 64,537 holders of poll tax receipts in the year 1955, from which the March, 1956, term of jurors was necessarily selected under Arkansas law.

The jury commissioners for the March, 1956, term in the First Division of Pulaski County Circuit Court testified that they selected jurors for the regular and alternate panel whom they thought to be qualified, capable and desirable, without consideration of race. They testified that they were, each of them, familiar with qualified Negroes, but did not select Negroes with the intention of having any particular number, but did select three Negroes on the regular panel. (Note 2.)

Note 2: In considering this case, the court has ignored any distinction between the regular panel and the alternate panel. Though Negroes seem to have been omitted from all alternate panels save one, in a county the size of Pulaski the panels actually

The precise question before the court is whether there was discrimination in the selection of the jury panel which tried and convicted petitioner. Of course, the question is not foreclosed by the answers of the jury commissioners; the discrimination alleged may be established by evidence showing disproportionate representation over such a period of time that the burden is shifted to the State to show that it is not the result of systematic limitation. *Cassell* v. *Texas;* and *Akins* v. *Texas, supra; Avery* v. *Georgia*, 345 U.S. 599 (1953); *Patton* v. *Mississippi*, 332 U.S. 463 (1947).

The court does not believe that the evidence offered in this case of racial representation on the jury panels in the First Division from March, 1952, through March, 1956, establishes such a pattern of disproportionate representation as to compel the finding that it must necessarily have been achieved through discriminatory limitation upon the basis of race.

In 1955, the poll tax year from which petitioner's jury was selected, Negroes constituted 13.3% of the poll tax holders in Pulaski County. Negroes constituted 8.33% of the regular and alternate jury panels initially selected, and 8.1% of the panel from which petitioner's jury was chosen. We do not believe that such evidence is sufficient to support a *prima facie* case of discrimination. In arriving at these conclusions:

(1) That there was no discrimination in the selection of the panel of the 1956, March term, and

(2) That a *prima facie* case of discrimination has not been made by a comparison of jury panels through a number of prior years,

the court has considered the following factors:

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serve, in effect, as one panel of 36, rather than as a panel of 24 with 12 alternates; the large number of cases tried make it almost certain that all will be called upon to serve

A. As to the special panel for the March, 1956, term the record discloses some confusion. Petitioner's Exhibit No. 1 indicates that 450 jurymen were selected, but other testimony indicates that all of these persons may not have appeared in court, and one of the special panels may not have been opened. None of the special jurors seem to have been Negroes, although the evidence is somewhat uncertain on this point; all were required initially for the Leggett case, on appeal *Leggett* v. *State*, 227 Ark. 393 (1957) tried prior to petitioner, Bailey, but at the same term of court. The record discloses that the first special panel had 50 names, the second special panel 149, and that these two panels contain the only special jurymen involved in any way in the selection of petitioner's jury.

Petitioner's jury was selected from a list of 37 jurors, seven from the first special panel, seven from the second special panel, and the remaining 23 from the regular panels. So far as is shown by the record, none of the special jurors other than the 14 just mentioned ever served again during the 1956, March, term after the conclusion of the Leggett case. The only relation of these special jury panels to petitioner's case arises from the fact that these 14 jurors served as part of the panel from which his jury was selected.

Further, it cannot be said that the record supports the contention that Negroes are normally discriminated against by exclusion or limitation as regards special panels in the First or Criminal Division of the Pulaski Circuit Court. It is established that prior to 1956 in several of the years Negroes were called on such special panels. One of the problems in regard to these special panels is that the race of the individual jurors is usually not designated, making it impossible to determine the race

of special panel members not called on to appear. Mr. Rosteck testified, referring to the special panels at the terms in which Bailey was tried, that it was impossible to determine whether the jurors not reporting were white or colored, because these special lists (referring particularly to special panel number one and special panel number two) show only name, address and telephone number of the jurors, with no designation of race. The names of the jurors on special panels are put in sealed envelopes and opened only on order of the court. This is apparently not the case with the regular panels, where the race of the Negro and white jurors is in most instances indicated by the jury commissioner when the lists of such regular jurors are submitted to the court.

B. No evidence has been introduced by petitioner in support of his allegation that there was an understanding on the part of the jury commissioners, either those for the term of March, 1956, or for prior terms, to limit the number of Negro jurors.

C. As has been stated, the Circuit Court of Pulaski County is divided into three divisions, each of which selects its own jury panel. The First Division tries only criminal cases, while the Second and Third handle the civil docket. One of the contentions of petitioner is that there has been an intentional and systematic exclusion of Negroes to serve on the jury panels in these civil divisions, and that 17 special jurors from the panel of the Third Division were called in one case in the First, or Criminal, Division.

It appears to be true that no Negro has been selected on any of the jury panels of these two Civil divisions since 1939; however, it is undisputed that the only case that any of the jurors chosen for the civil divisions have been used

in the criminal division was in the 1956, March, term in the trial of Leggett, who was a white man, when 17 jurors from the Third Division were temporarily "borrowed" by the First Division for the purpose of selecting the Leggett jury. After the Leggett case, these jurors were returned to the Third Division and were not recalled to the First Division. The record shows that this is the only instance that any jurors selected for the civil divisions have ever been used in the criminal divisions. The relevance of jury discrimination, if any, in the civil divisions to petitioner's case is not established.

D. Over the objection of the State, evidence of Negro representation on jury panels subject to March, 1956, was received for its relevance, if any, in the establishment of a *prima facie* showing of discrimination. Petitioner presented evidence that several Negroes selected as jurors had served on more than one panel. However, only one Negro had served twice before petitioner's trial (Mr. D. B. Lacefield, in March, of 1951 and September of 1955); there had been no other repetition of Negro jurors between March, of 1951, and March, of 1956, and none of the three Negroes on petitioner's jury panel had served prior to that term.

E. The failure to have Negro jury commissioners is not discrimination. *Moore* v. *Hensley*, F.2d (8th Cir. 1960). Nor does the court think that there is a sufficient showing of unfamiliarity with qualified Negroes to bring this case within the rule of *Cassell* v. *Texas*, *supra*. All the jury commissioners testified they have lived in Pulaski County for a long time and were acquainted with the names of many Negroes they would consider qualified if found to have a poll tax for 1955. Three of the jurors they selected were Negroes. All the commissioners were engaged in businesses which brought

them into contact with Negroes. We do not understand that the familiarity with eligible jurors of all races and creed required of jury commissioners must necessarily proceed from social or personal contacts. It is the knowledge, not its source, which is important.

The court has come to the conclusion that there was no racial discrimination practiced in the selection of the jury panel which tried petitioner. Any disproportion of Negro representation on such panel or in the total group from which the panel was actually selected does not seem to have been the result of consideration of race, either in the selection or non-selection of particular jurors.

Our examination of the record has led us to the same conclusion reached by the courts that have previously considered this case. We believe that petitioner was afforded a fair trial, that his constitutional rights were observed, and that he has had a full measure of judicial review of his conviction. Judge J. Smith Henley found that Bailey was not denied a fair trial, that the trial judge appeared to have been careful to protect all of the legitimate rights of Bailey, and that his conviction was supported by the evidence. *Bailey* v. *Henslee*, 168 F. Supp. 314 (E.D. Ark. 1958). The Eighth Circuit Court of Appeals held:

> "We have examined the entire record with great care and are convinced that the guilt of the defendant was proved by the evidence beyond a reasonable doubt, and if the ruling denying him compulsory process for the production of the jury commissioners as witnesses was a technical denial of a Constitutional right, there is no proof that he was injured thereby, and he has clearly waived this Constitutional right . . . We are convinced that he had a fair trial."

Bailey v. Hensley, 264 F.2d 744, at 748-49 (1959) (Gardiner, Chief Judge).

Nearly four years have elapsed since petitioner's original trial. The same question attempted to be raised by petitioner in this proceeding was first presented by him at his trial four years ago. The question now raised by petitioner was not presented to this court in his previous petition for federal habeas corpus although no reason is assigned for this failure. We do not believe that this piecemeal presentation of alleged errors is helpful in maintaining public confidence in the administration of justice. Any defendant is entitled to utilize fully the procedures established for reviewing and correcting alleged errors in his trial, but it does not seem improper to demand that he do so in an orderly and efficient fashion. If, through ingenuity of counsel, alleged errors may be continually devised and litigated through all steps of appeal, it is difficult to see how the public interest in the efficient punishment of crime is to be served.

No additional facts have been discovered since the petitioner's original trial and no reason is shown why all of the contentions now presented should not have been long since disposed of—in fact, we think they have been disposed of. Of course, every man is entitled to a fair trial, and this precious right should be jealously guarded. However, after petitioner has had full opportunity to present his defense, and full review has been made by the appellate courts, what purpose is served by interminable delay in the final adjudication of his case? Such delays cast doubt, and some even say discredit, on the administration of justice.

VII

It is, therefore, considered, ordered and adjudged that the order to show cause heretofore entered be, and hereby is, vacated; that the petition for a writ of habeas corpus be, and hereby is, denied; that certificate of probable cause for the appeal of the case will be denied petitioner; but that the Clerk of this Court will be ordered to supply without charge, upon request by petitioner, such portions of the record as he reasonably may require to make application for a certificate of probable cause to one of the judges of the Court of Appeals for this Circuit, or to the Court of Appeals itself, or to the Circuit Justice.

This, the 26 day of May, 1960.

/s/ Gordon E. Young

District Judge